WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JAMES HUNTER, *Applicant*

vs.

SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants*

Adjudication Numbers: ADJ9027080; ADJ7299336; ADJ8027597
Oakland District Office

OPINION AND ORDER
DENYING PETITION FOR RECOSIDERATION

Applicant James Hunter seeks reconsideration of the January 7, 2025 Findings and Order, wherein the workers' compensation administrative law judge (WCJ) found that applicant does not meet the requirements for entitlement to the Subsequent Injuries Benefits Trust Fund (SIBTF) because applicant's September 30, 2010 subsequent injury does not meet the 35% eligibility threshold nor the 5% opposite and corresponding member threshold.

Applicant contends that the September 30, 2010 subsequent injury, which is a specific injury to applicant's lumbar spine, should be re-characterized as a cumulative trauma injury through the last date worked, which presumably was January 6, 2011.

We received an answer from SIBTF. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and for the foregoing reasons, we deny reconsideration.

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on April 11, 2025, and 60 days from the date of transmission is June 10, 2025. This decision is issued by or on June 10, 2011, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 11, 2025, and the case was transmitted to the Appeals Board on April 11, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 11, 2025.

II.

The WCJ erroneously applied apportionment in determining the 35% SIBTF eligibility threshold. (Report, p. 8.) Permanent disability attributable to applicant's subsequent injury for the purpose of meeting the 35% threshold requirement under section 4751 excludes apportionment. (*Todd v. Subsequent Injuries Benefits Trust Fund* (2020) 85 Cal. Comp. Cases 576 [2020 Cal. Wrk. Comp. LEXIS 35] (Appeals Board En Banc); *Anguiano v. Subsequent Injuries Benefits Trust Fund* (November 7, 2023, ADJ11107890) [2023 Cal. Wrk. Comp. P.D. LEXIS 310]; *Heigh v. Subsequent Injuries Benefits Trust Fund* (October 9, 2023, ADJ12253162) [2023 Cal. Wrk. Comp. P.D. LEXIS 269]; *Riedo v. Subsequent Injuries Benefits Trust Fund* (October 21, 2022, ADJ7772639) [2022 Cal. Wrk. Comp. P.D. LEXIS 303]; *Anguiano v. Subsequent Injuries Benefits Trust Fund* (August 15, 2023, ADJ11107890) [2023 Cal. Wrk. Comp. P.D. LEXIS 214]; *Hagen v. W.C.A.B. (Anguiano, Juan)* (2024) 89 Cal. Comp. Cases 702 [2024 Cal. Wrk. Comp. LEXIS 33] (writ denied); and *Millner v. Subsequent Injuries Benefits Trust Fund* (October 7, 2024, ADJ17739286) [2024 Cal. Wrk. Comp. P.D. LEXIS 360].) However, even if apportionment was not applied, applicant would not have met the 35% threshold requirement. Agreed Medical Evaluator David K. Pang, M.D. opined that applicant's lumbar injury was equally attributable to applicant's September 30, 2010 injury and the cumulative injury ending in April 28, 2009. (Dr. Pang's report dated April 1, 2003, p. 7; Dr. Pang's report dated November 30, 2009, p. 3.) The July 29, 2013 Stipulation and Award settled the September 30, 2010 subsequent injury for 10% permanent disability. That means that applicant's September 30, 2010 subsequent injury rated at 20% without the 50% apportionment, which still does not meet the 35% eligibility threshold. Dr. Pang subsequently increased applicant's lumbar rating by 1% WPI (whole person impairment) to 11% permanent disability. (See Dr. Pang's report dated November 30, 2009, p. 3.) This still does not meet the 35% eligibility threshold because excluding the 50% apportionment would result in 22% permanent disability.

Furthermore, we do not believe that applicant's failure to include the September 30, 2010 injury in the April 17, 2014 Petition to Reopen was necessarily fatal. (*See Jamerson (Patrick) v. Commercial Metals Company* (2022) 87 Cal. Comp. Cases 530 [2022 Cal. Wrk. Comp. P.D. LEXIS 64]; *City of Richmond v. Workers Compensation Appeals Bd.* (1998) 63 Cal. Comp. Cases 1419 [1998 Cal. Wrk. Comp. LEXIS 5013].) Nevertheless, we agree with the WCJ's reasoning in

his reliance on Dr. Pang's reports in determining that applicant does not meet the 35% eligibility threshold.

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant James Hunter's Petition for Reconsideration of the January 7, 2025 Findings and Order is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2025

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

JAMES HUNTER
MANGOSING LAW GROUP
OFFICE OF THE DIRECTOR – LEGAL

LSM/pm

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o

REPORT AND RECOMMENDATION ON
APPLICANT'S PETITION FOR RECONSIDERATION
AND
NOTICE OF TRANSMISSION TO THE
RECONSIDERATION UNIT OF THE APPEALS BOARD

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) dated February 3, 2025, the represented Applicant through counsel, seeks reconsideration of the Findings & Order with Opinion on Decision (F&O), dated and served on January 7, 2025. That F&O found in relevant part that the Applicant did not meet the requirements for entitlement to benefits from the Subsequent Injuries Benefit Trust Fund (SIBTF) under Labor Code section 4751, because the subsequent industrial injury (SII) on September 30, 2010, does not meet the 35% total PD requirement/threshold, and does not involve a hand, arm, foot, leg, or eye, and/or the opposite and corresponding member, with the result that the Applicant was found to take nothing with respect to his SIBTF claim. (**Id**. at p. 1.)

I apologize to the parties and the Board for the delay in submitting this Report 2024, which provides, "(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board." That transmission occurs now, with the service of this Report and Recommendation and the electronic transfer of the matter via EAMS to the WCAB.

Applicant's Petition alleges generally: 1. the Judge acted without or in excess of his powers; 2. the evidence does not justify the findings of fact; and 3. the findings of fact do not support the order, decision or award. (Petition at p. 1.) More specifically, it argues that I improperly relied on the opinions of the AME whose reporting was the basis for the Stipulation and Award which settled the SII, orthopedist David Pang, M.D., and improperly ignored the subsequent medical legal reports obtained by Applicant's attorney for purposes of Applicant's SIBTF claim. Those reporting doctors seem to have found an industrial cumulative injury through last day worked to multiple body parts, in contrast to the reporting of Dr. Pang, who in his

contemporaneous reporting only found a specific injury on September 30, 2010, to one body part, the low back, and did not find any cumulative injury. Applicant attorney argues and asserts that based on his med/legal reporting, the court should have "recharacterized" the SII and found a cumulative trauma injury through September 30, 2010, and should rely on their findings of the additional body parts involved in that purported cumulative injury, and the associated PD, which in its face would satisfy the 35% threshold. (Id. at p.3.) Thereafter, the Petition focuses on my reliance on the AME opinions of Dr. Pang, and does not anywhere explain how or why the reporting of his med/legal experts is more compelling and/or credible than that of Dr. Pang, which was my finding as explained in the Opinion on Decision at pages 8-9.)

Defendant filed an Answer to Applicant's Petition dated February 12, 2025, which asserts that the evidence supports the court's finding that the SII does not meet either the 35% threshold, or the 5% opposite and corresponding threshold, and therefore the Applicant does not qualify for SIBTF benefits. (Id. at p. 1.) It further argues that the AME in the SII case, Dr. Pang, found a specific injury on September 30, 2010 to the lumbar spine only, in ADJ9027080, which rated to 11% PD. (Id. at p. 2.) That claim originally settled by Stipulations and Award for 10% PD, with future medical treatment for the lumbar spine, which was approved by Judge Stanley Shields on July29, 2013. (Id.) After Applicant filed a Petition to Reopen his earlier two injuries, but not that specific injury, Dr. Pang re-examined the Applicant, and found that date of injury only involved the lumbar spine, that there was no cumulative injury, and that the Applicant's PD had increased to 11% PD. (Id. at p. 3.) Based on this report, Applicant settled the petition to reopen the two 2009 claims, via a Compromise & Release (C&R) approved on December 3, 2020, approved by Judge Lilla Szelenyi, which also bought out all three future medical awards. (Joint 102.)

BACKGROUND

This SIBTF claim was tried on October 10, 2024, and the Applicant, James Hunter, now known as James Jenkins, Jr., was the only witness to testify. (MOH/SOE dated 10/10/24, at pp. 5-7.) The issues for determination were: 1. whether Applicant met the requirements entitling him to SIBTF benefits per Labor Code section 4751, and whether Applicant's medical legal reporting was substantial medical evidence, and 2. if so, the Applicant's current level of PD. (**Id**. at pp. 2-3.)

The Applicant originally settled the SII injury in this case dating from September 30, 2010, related to his employment at Precision Castparts/PCC Structural via Stipulations and Award approved on July 29, 2013 by Judge Stanley Shields for 10% PD with future medical for the lumbar spine. (Joint 101) Upon further review, that claim was never reopened, although I note to my chagrin the Opinion on Decision at pages 3 and 5, incorrectly indicates that all three of the Applicant's prior Awards were the subject of a Petition to Reopen. The Petition at page 2, lines 23.5, also alleges incorrectly that all of Applicant's claims were timely reopened, but a review of EAMS/Filenet makes clear that no Petition to Reopen was ever filed in the SII claim, i.e., ADJ9027080. At the time of all the prior stipulations, Applicant was represented by current counsel, Phil Allen. Applicant subsequently settled two other and earlier claims dating from April 28, 2029, ADJ7299336, and a cumulative injury claim through the same date, April 28, 2009, ADJ8027597, against the same employer, via a single joint Stipulations and Award for 27% PD with future medical in ADJ72999336 for the shoulder, and in ADJ8027597, for the neck, low back and bilateral shoulders, which was approved by Judge Shields on August 12, 2013. (Joint 103.) That settlement like the SII case, was explicitly based on the AME reporting of Dr. David Pang. (**Id**. at p. 7.) The joint award in those two claims was the subject of a timely Petition to Reopen filed on April 17, 2014 in each case. (EAMS No. 12081314.) The Petition to Reopen the earlier claims and the medical Award were settled and bought out respectively via a global C&R approved by Judge Lilla Szelenyi, on December 3, 2020, for $104,482.68, which included a self-administered Medicare Set Aside (MSA) for $43,207.00, which was based on an AME re-exam by AME, Dr. Pang. (Joint 103.)

In support of Applicant's SIBTF claim, Applicant's attorney obtained med/legal reports from multiple medical specialists, including internist Scott Anderson, M.D., report dated May 8, 2019 (Applicant's 1), neurologist, Pramila Gupta, M.D., report dated July 9, 2019 (Applicant's 2), orthopedist, Anthony Bellomo, M.D., report dated June 10, 2022 (Applicant's 3), psychiatrist Alberto Lopez, M.D., report dated August 26, 2019 (Applicant's 4), the now late orthopedist Michael Charles, M.D., report dated December 5, 2019 (Applicant's 5), and physiatrist, Michael Sinel, M.D., report dated August 14, 2019. (Applicant's 6.) As noted in the Opinion on Decision at p. 5, the Applicant's trial testimony was not particularly significant and/or relevant to the crux of the dispute at issue. In my estimation, he came across as a poor historian, and some of his testimony was successfully impeached by defense counsel using his prior deposition testimony.

The Opinion on Decision at page 7, also points out Applicant's physiatry evaluator, Dr. Sinel's unsolicited comment (Applicant's 6, report of 8/14/19, at page 3) that the Applicant was a poor historian who "had difficulty remembering." This is consistent with my impression of his trial testimony. Dr. Sinel's report at the same page also references his continuing to work through the date of his termination in January. 2011. (Applicant's 6, at p. 3.)

DISCUSSION

There is no dispute that any decision of a WCJ must be supported by substantial evidence in light of the entire record. (Labor Code section 5952(d); Escobedo v. Marshalls (2005) (Appeals Board en banc) 70 Cal.Comp.Cases 604, 620; Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310, 314]; Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500, 503]; LeVesque v. Workmen's Comp. Appeals Bd. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16, 22].) To be substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and must set forth the reasoning used to support the expert conclusions reached. (E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687, 1691]; Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Board en banc).) "[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (Citations.)" (Gatten, supra, at p. 928.)

In my view, the claims of error raised in Applicant's Petition essentially amount to the argument that with respect to the SII dating from September 30, 2010, which settled by Stipulation and Award on July 29, 2013, for 10% PD with future medical for the low back only, should be disregarded and should be treated or "recharacterized as a cumulative trauma claim with a much higher level of associated PD based on the reporting of the med/legal evaluators obtained by Applicant's attorney years later. As mentioned above, the Opinion on Decision incorrectly stated that Award was the subject of a pending Petition to Reopen, when it was bought out as part of the global C&R, which included buyout and settlements of the prior Award and petition to reopen the two companion only claims in ADJ7299336, and ADJ8027597. This has special legal

significance, since contrary to my statement at the bottom of page 5 of the Opinion on Decision which assumed no final level of PD had been determined on the SII because of my incorrect belief at the time that is was the subject of a pending petition to reopen, that was not the case. In my view, this only strengthens the validity of my finding that the 35% threshold with respect to the SII has not been met, since it was a final level of PD, which is in no way ambiguous, i.e., 10% PD, per the original stipulations approved on July 29, 2013.

While the discussion on page 6 of the Opinion on Decision which summarized the AME Dr. Pang's re-exam reporting, and the associated DEU ratings which were the basis of the later C&R approved on December 3, 2020, is now not quite as important, since the referenced increase in PD for the low back to 11%, does not apply to the SII, but rather only to the earlier cumulative injury claim through April 28, 2009, which is the only other claim to involve a future medical award for the low back. There was no increase in PD found and/or attributable to the September 30, 2010, date of injury, because that claim and related future medical award for the low back, was never reopened and was and remains final at 10% PD. In short, that is the stipulated and final PD of the SII. (Joint 101.) There was no pending petition to reopen that award or the related PD level in that case at the time its future medical award was bought out as part of the global C&R approved on December 3, 2020, with the two earlier 2009 dates of injury, which did have a then pending petition to reopen. (Joint 102.)

Applicant attorney cites to no legal authority for the proposition that a clear and explicit SII involving a stipulated single body part, low back, and PD level, i.e., 10% PD, can and/or should be replaced and "redefined" for purposes of applying Labor Code section 4751 analysis, by a theoretical cumulative injury through the same date, based on what is essentially partisan med/legal reporting obtained years later to support Applicant's SIBTF claim, and furthermore to argue that additional body parts, e.g., internal, psyche, neurological, etc., should be added to that SII and should be considered as part of that DOI for purposes of determining the 35% threshold. As the Answer at page 2 notes, and as I pointed out in the Opinion on Decision at page 6, Dr. Pang, the AME for purposes of the 2009 and 2010 SII, did not find injury to any other body part besides the low back for the September 30, 2010 DOI, and did not find any cumulative injury. As I explained in the Opinion on Decision at pages 7-8, I found that contemporaneous reporting to be

more credible on those key issues than the reporting of Drs. Bellomo and Dr. Gupta, obtained by Applicant's attorney.

I concede and there is no dispute that the SIBTF proceeding is an entirely new proceeding and the trial judge is not necessarily bound by the earlier med/legal reporting, which gave rise to the prior SSI award. However, in my judgment I am bound by the clear and explicit stipulation, which was final, and not subject to reopening, which constitutes the SII in this case, namely stipulations at 10% PD with future medical for the lumbar spine. Even if that PD level was not final, which I mistakenly thought at the time of the prior decision because of my belief it had been reopened, as explained in the Opinion on Decision at page 6, the reporting of Dr. Pang as part of the petition to reopen the earlier two claims, only one of which the CT, involved, the low back, ADJ8027597, at best by the time of the C&R, the low back PD, even if somehow it could be attributable to the SII, which I don't think it can on these facts, had only increased to 11% PD, given his re-exam, his new rating i.e., 15 WPI, and his unchanged opinion of 50% apportionment to the SII. (See also the similar discussion in the Answer at page 3.)

Even if one were to find the reasoning of Applicant's orthopedic SIBTF med/legal evaluator Dr. Bellomo, who retrospectively found the Applicant sustained a cumulative trauma to multiple body parts, including the upper extremities, as quoted in the Opinion on Decision at page 8, he explicitly opined that such a CT injury ran through Applicant's last day worked. (See Applicant's 3, report of 6/10/22 at p. 71.) That date is different and later than the SII date of September 30, 2010. Although the exact last day worked at PCC is not clear on this record, there is significant evidence in the various medical reports in evidence that he returned to work and continued to work at least for some periods, up until he was reportedly terminated sometime in January of 2011. I concede that Dr. Bellomo on page 70 of his June 10, 2022, says there was "one cumulative injury through September 2010," but this appears to have been based on a misapprehension that was Applicant's last day worked, which does not appear to be the case. (Applicant's 3 at p. 70.) If there is in fact one cumulative injury, it seems clear that Dr. Bellomo's reasoning and opinion is that such a CT runs though Applicant's last day worked, which is later than the SII, and presumably sometime in January 2011 when he was terminated. Similarly, Dr. Gupta, Applicant's SIBTF neurology evaluator, who diagnosed bilateral carpal tunnel syndrome and bilateral ulnar neuropathy and borderline peripheral neuropathy, (Applicant's 2, report of

7/9/19 at pp. 81-82), concluded it was the result of "cumulative trauma ending on the last date of employment, January 6, 2011." (**Id**. at p. 84.) Since the Applicant never filed a workers' compensation claim through last day worked, even after having potential notice of such a claim via these reports, it is clear that the SII for purposes of the Labor Code section 4751 analysis is the stipulated September 30, 2010, and not a theoretic cumulative injury through last day worked, i.e., on or about January 6, 2011, which involves additional body parts beyond the lumbar spine.

RECOMMENDATION

In conclusion, I stand by my Findings & Order dated January 7, 2025, and for the reasons explained above, I do not believe they are in error factually and/or legally. I therefore recommend that reconsideration be **DENIED**.

NOTICE OF TRANSMISSION

Pursuant to Labor Code section 5909, the parties and the Appeals Board are hereby notified that this matter has been transmitted to the Appeals Board on April 11, 2025.

Dated: April 11, 2025

Thomas J. Russell, Jr.
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE